No. 15,528

In the United States Court of Appeals for the Ninth Circuit

UNITED MERCURY MINES COMPANY, A CORPORATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition for Review of the Decision of the Tax Court of the United States

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BRIEF FOR THE RESPONDENT

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OPINION BELOW

The memorandum opinion of the Tax Court (R. 35-37) is not officially reported.

JURISDICTION

The petition for review (R. 38-40) involves a deficiency in excess profits tax for 1944 in the amount of $113,453.68.[1] Taxpayer's income tax returns for 1944 and 1945 were filed with the Collector of In-

[1] The deficiency in this amount is partially offset by the Commissioner's tentative determination (See R. 11-12) of an over-assessment of $57,071.69 in income taxes for 1944.

ternal Revenue for the District of Idaho. Taxpayer filed no excess profits tax returns for 1944 and 1945. (R. 23-34.) On February 1, 1955, the Commissioner mailed a notice of deficiency to the taxpayer advising it of a deficiency in excess profits tax in the amount of $113,453.68 (R. 9-19). Within 90 days thereafter, on April 25, 1955, taxpayer filed a petition for redetermination of the deficiency under Section 272 of the Internal Revenue Code of 1939. (R. 3, 5-9.) On December 26, 1956, the Tax Court entered its decision, finding a deficiency in excess profits tax in the amount determined by the Commissioner (R. 38). The case is brought to this Court by a petition for review filed by the taxpayer on March 22, 1957. (R. 38-40.) Jurisdiction of this Court is invoked under the provisions of Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

Taxpayer, a vendor under a "Conveyance, Royalty Agreement and Option" of tungsten properties, received royalty income from the vendee, who operated and worked the properties and extracted, transported, marketed and sold the ore. Taxpayer at no time engaged in the removal of ore for sale from the tungsten properties.

Did the Tax Court err in holding that such royalty income was not exempt from excess profits tax under Code Section 731 on the ground that taxpayer was not engaged in the mining of tungsten within the meaning of that section?

STATUTE INVOLVED

Internal Revenue Code of 1939:

> SEC. 731 [as added by Sec. 226 (a), Revenue Act of 1942, c. 619, 56 Stat. 798]. CORPORATIONS ENGAGED IN MINING OF STRATEGIC MINERALS.
>
> In the case of any domestic corporation engaged in the mining of * * * tungsten, * * * the portion of the adjusted excess profits net income attributable to such mining in the United States shall be exempt from the tax imposed by this subchapter. The tax on the remaining portion of such adjusted excess profits net income shall be an amount which bears the same ratio to the tax computed without regard to this section as such remaining portion bears to the entire adjusted excess profits net income.
>
> (26 U.S.C. 1952 ed., Sec. 731.)

STATEMENT

A portion of the facts was stipulated. (R. 22-27.) The findings of the Tax Court (R. 28-35) may be summarized as follows:

Taxpayer is an Idaho corporation organized in 1921. Its authorized capital is $500,000, consisting of five million shares of the par value of 10 cents per share, all of which are issued and outstanding. By its charter, taxpayer is authorized generally to engage in the mining business, to acquire, hold, manage, develop, operate, and work mining properties, together with the usual incidental powers. Since its incorporation taxpayer has been so engaged in an

area known as the Yellow Pine Mining District, Valley County, Idaho. (R. 28.)

In general, the mineral properties belonging to taxpayer in 1941 consisted of approximately 700 mining claims covering about 14,000 acres. These properties may be designated as follows (R. 28-29):

1. *The Stibnite Property.* This consisted primarily of two groups of mining claims, the first known as the Meadow Creek group, and the second known as the Hennessy group or East Fork group. The Hennessy group contained large deposits of Tungsten ore.
2. *The Midnight Group.* This consisted of mining claims located near the Stibnite property.
3. *Smokey Ridge Group.* This consisted of mining claims located near the Stibnite property.
4. *Antimony Ridge Group.* This consisted of quicksilver, gold and antimony mining claims lying northwest of the Stibnite property.
5. *Cinnabar Group.* This consisted of quicksilver mining claims lying east of the Stibnite property.

The Bradley Mining Company, hereinafter referred to as Bradley, was organized under the laws of California for the purpose of engaging in the mining business. Bradley was a large operating concern with considerable working capital.

On August 5, 1927, taxpayer negotiated an option agreement with Bradley for the development and operation of the Meadow Creek and Cinnabar claims. The agreement also granted Bradley an option to purchase taxpayer's title in the mining claims for $1,500,000. In the meantime taxpayer was to receive

certain payments which were to be credited toward the purchase price. The agreement of August 5, 1927, did not extend to the Hennessy mining claims which were purchased outright by Bradley in 1927. After spending approximately $30,000 on the Hennessy claims, Bradley abandoned them. Taxpayer reacquired the Hennessy claims and they were included, along with the Meadow Creek claims, in subsequent agreements executed between Bradley and taxpayer in 1930 and 1939. These two groups of claims comprised the Stibnite mining properties heretofore mentioned. (R. 29-30.)

The acquisition of the Hennessy claims was described in the option agreement dated May 16, 1939, as follows (R. 30):

> AND WHEREAS, subsequent to said agreement on October 3, 1930, the Yellow Pine Company and its successor in interest, the Bradley Mining Co., acquired a group of mining claims known as the Hennessy Group, which said group of claims was acquired with the understanding and agreement that it would become a part of the Meadow Creek Group of lode mining claims and to be owned by the United Mercury Mines Company until the acquisition of the entire Meadow Creek Group by the Yellow Pine Company; * * *

On September 4, 1939, Bradley and taxpayer executed a "Form of Agreement For Mineral Explorations" granting to the Government the right to enter upon the Stibnite property for the purpose of prospecting, drilling, and exploring for minerals. The exploratory operations were not commenced until the summer of 1941. The drilling was at Government

expense, under the supervision of the Bureau of Mines, and resulted in the discovery of tungsten. (R. 30.)

The contractual relationship which had existed between Bradley and taxpayer from 1927 to 1941 was terminated on December 31, 1941, and on the same date a new agreement designated "Conveyance, Royalty Agreement, and Option", was executed. (R. 30-31.) That agreement provides in part as follows (R. 31-32):

> That the said UNITED [taxpayer] for and in consideration of the royalty hereinafter agreed to be paid by BRADLEY * * * has GRANTED, BARGAINED, SOLD, and ASSIGNED, and does by these presents grant, bargain, sell and assign, unto BRADLEY * * * all of the following described lode and placer mining claims situate in the Yellow Pine Mining District, Valley County, State of Idaho, consisting of two groups of lode mining claims, the first of said groups being commonly known as the MEADOW CREEK Group, and the second of said groups being commonly known as the HENNESSY Group * * *.
>
> Together with the personal property situated upon said mining claims;
>
> Together with all millsites, power plants, transmission lines, dams, reservoirs, mills, dwellings, buildings, structures, water rights, tail races, tailing sites, tailing dams or easements * * * TO HAVE AND TO HOLD, subject to the royalty herein reserved and retained by UNITED, all and singular the said premises, together with the appurtenances and privileges thereunto incident, unto the said BRADLEY, its successors and assigns, forever.

* * * *

For and in consideration of the premises * * * BRADLEY * * * does hereby covenant, promise and agree to pay to UNITED * * * a royalty of five percent (5%) on all net smelter returns, net revenue, and net mint returns, as defined herein * * *; the payment of said five percent (5%) royalty to begin with the first returns received on concentrates shipped from Cascade, Idaho, after Midnight, December 31, 1941, and to continue thereafter for nine hundred and ninety-nine (999) years and as long thereafter as minerals, ores or values shall be extracted, mined or taken from the above described property * * *.

* * * *

It is agreed that the time, amount, extent and manner of conducting mining operations and development work upon or in the above-described mining claims shall be in the sole discretion of BRADLEY * * * and that the failure of BRADLEY to mine shall not be held to be a condition subsequent defeating the conveyance made hereby.

Anything in this agreement contained to the contrary notwithstanding, it is the intention of the parties to this agreement that the full ownership, possession and control of all the properties above described, * * * and all of the personal property acquired and/or used on or in connection with the operation and development of the above described properties, shall be vested in BRADLEY, and the UNITED shall have no interest in fee in or to said properties, or in and to any of the personal property acquired and/or used in connection with the operation and development of said properties; * * *.

After 1941 the operations conducted by Bradley were primarily directed toward the development and mining of tungsten from the Hennessy mine. Between 1927 and 1933 Bradley expended in excess of $100,000 per year in development of the properties under the option agreements. (R. 32-33.)

The option agreement dated May 16, 1939, provided in part as follows (R. 33):

> AND WHEREAS, the party of the second party [Bradley] went into actual possession of said properties and began bona fide development work thereon upon the signing of and in accordance with the provisions of said option agreement dated August 5th, 1927, and has during each and every year thereafter expended in developing and equipping in, upon, and/or for the benefit of said properties a sum of not less than twenty-four thousand dollars ($24,000.00);

Bradley erected mine buildings, a concentration plant, and other buildings, and installed the power generating equipment. It owned the equipment, machinery, and other personal property located at the mine. Bradley operated the Stibnite properties. It extracted, transported, marketed and sold the ore and received the payments from purchasers. At no time before or after the 1941 contract did taxpayer engage in the removal of ore for sale from the Stibnite and Midnight group of properties. (R. 33.)

The relationship between taxpayer and Bradley was not always harmonious. Differences frequently arose with respect to provisions of the agreements which were amicably adjusted. However, sometime subsequent to the taxable year taxpayer instituted a

suit against Bradley which involved an issue with respect to royalty computations. *United Mercury Mines* v. *Bradley Mining Co.*, 233 F. 2d 205 (C.A. 9th). (R. 33-34.)

Taxpayer was engaged in mining the Cinnabar property for quicksilver in 1944 and 1945. In 1941 taxpayer deeded a 55 per cent interest in the Cinnabar property to Bonanza Mines, Inc. The Cinnabar property had not been worked prior to the transfer. Thereafter a reduction plant was built and the property was operated as a joint venture by taxpayer and Bonanza. Taxpayer also worked the Antimony Ridge property for antimony in 1944 and 1945. This mining operation resulted in losses during the period 1941 to 1944, inclusive. In 1947 the Antimony Ridge property was transferred to Bradley. (R. 34.)

In its income and declared value excess profits tax return for 1944 taxpayer reported the following (R. 34):

Royalty income under contract dated December 31, 1941	$219,439.42	
Income from operation of Antimony Ridge mine	(14,160.36)	Loss
Income from operation of Bonanza mine	(15,035.87)	Loss
Total income reported	$190,243.19	

Taxpayer did not file an excess profits tax return for 1944. (R. 28.) The Commissioner determined that its royalty income from the Stibnite property in 1944 was not exempt from taxation under Section 731 of the 1939 Code and accordingly determined the

deficiency in excess profits tax in issue here. (R. 15, 34-35.)

The Tax Court affirmed the Commissioner's deficiency determination, finding as a fact (R. 35) and holding (R. 35-37) that in 1944 taxpayer was not engaged in the mining of tungsten from the Stibnite property within the purview of Section 731 of the Code.

SUMMARY OF ARGUMENT

The Tax Court correctly held that the taxpayer was not exempt from excess profits tax under 1939 Code Section 731 with respect to the royalty income from tungsten which it received in 1944 from properties it had sold to Bradley in 1941. Section 731 is applicable only to a corporation "engaged in the mining of" "certain specified minerals. The statute, by its plain language, is concerned only with corporations engaged in making or working a mine, and deriving income therefrom. The mere recipient of a royalty interest, such as the taxpayer in this case, is clearly not engaged in doing either.

In addition to the plain language of the statute, its history and purpose are consistent with the result reached by the Tax Court, and they preclude any argument that this extraordinary tax exemption was intended to be available to a corporation which was merely the passive recipient of royalty income during the taxable year.

Even assuming, *arguendo* only, that a broader definition of mining should be adopted so as to include treatment processes, the taxpayer here still cannot

in any sense be considered to have been engaged in mining tungsten from the Stibnite properties in 1944. That taxpayer had engaged in mining on other properties, or that it had done some development work on this property many years prior to the taxable year, or that it did development work on nearby properties during the taxable year, does not qualify it for exemption in 1944 with respect to the royalties from tungsten.

ARGUMENT

The Taxpayer Was Not Engaged In Mining Tungsten During the Taxable Year; Its Royalty Income from the Tungsten Properties It Had Previously Sold Was Not Exempt from Excess Profits Tax Under 1939 Code Section 731

The sole issue in this case is whether the royalty income received in 1944 by the taxpayer from tungsten properties it had conveyed to Bradley in 1941 is subject to the excess profits tax, as the Tax Court held (R. 35-37) or whether, as the taxpayer claims (Br. 6-18), that income is completely exempt from tax because of the provisions of Section 731 of the Internal Revenue Code of 1939, *supra*. It is submitted that the Tax Court was entirely correct in holding that the statutory exemption does not extend to a corporation, such as the taxpayer, which was only the passive recipient of royalties and did not perform any active function during the taxable year relating to the mining of tungsten. Such a corporation is not "engaged in the mining" of strategic minerals, and the statute grants it no exemption.

The Tax Court relied (R 36-37) on this Court's

holding in *Oregon Chrome Mines, Inc.* v. *Commissioner*, 192 F. 2d 783, as controlling here. Contrary to taxpayer's contention (Br. 5), that case is indistinguishable. The *Oregon Chrome Mines* case involved a chrome mine operated by a lessee, whereas the instant case involves a tungsten mine operated by a vendee, but otherwise the facts are not materially different.

Furthermore, it is submitted there is no merit to the taxpayer's argument (Br. 5-7, 10, 13) that this Court's reasoning in the *Oregon Chrome Mines* case, *supra*, was improper and erroneous. Taxpayer contends that the legislative history of Section 731, *supra*, shows that the term "engaged in mining" is broader than the construction given by this Court in the *Oregon Chrome Mines* case. It will be recalled that the Tax Court in that case pointed out (15 T.C. 389, 393) that according to its more usual and ordinary definition, "mining" does not include treatment processes but, even if the broader definition in 1939 Code Section 114(b)(4)(B) were applied, the taxpayer there could not be considered as being engaged in mining chromite in the taxable year for the purposes of 1939 Code Section 731. In affirming the Tax Court, 192 F. 2d 783, 784-785, this Court held that the word "mining" as used in Section 731 is limited to its ordinary and usual definition. That conclusion is supported by convincing authority.

Wherever possible, the words of statutes must be given their ordinary everyday meaning. *Crane* v. *Commissioner*, 331 U.S. 1, 6; *Helvering* v. *Northwest Steel Mills*, 311 U.S. 46, 49; *Old Colony R. Co.*

v. *Commissioner*, 284 U.S. 552, 560. In accord with both the Tax Court and this Court's reasoning in the *Oregon Chrome Mines* case, the plain ordinary meaning of the statute here covers only the active processes of digging mines and removing the minerals from their source. By limiting the exemption to corporations engaged in mining, Congress clearly intended that Section 731 should apply only to corporations deriving income from working a mine. See the definition of "mining" in Webster's International Dictionary (Second ed.) as the "Act or business of making or of working mines."

The taxpayer here, which derived the royalty payments in question from the mining activities of others and which performed no mining activity with respect to tungsten during the taxable year, could scarcely be described as engaged in working a tungsten mine. According to the ordinary meaning of the statute, the taxpayer's income from tungsten royalties clearly was not intended to be exempt from the excess profits tax. Moreover, since Section 731 creates an exemption from tax, it must be strictly construed. *New Colonial Co.* v. *Helvering*, 292 U.S. 435, 440; *White* v. *United States*, 305 U.S. 281, 292; *Deputy* v. *Du Pont*, 308 U.S. 488, 493; *Helvering* v. *Northwest Steel Mills*, *supra*, p. 49; *Commissioner* v. *Jacobson*, 336 U.S. 28, 49.

Contrary to taxpayer's contention (Br. 8-13), the history and purpose of the statute, moreover, are persuasive that Congress used the term "mining" in its ordinary sense, and did not intend that the exemption should be applicable to corporations not actively

engaged in working a mine. A corresponding section was added to the Code when the excess profits tax was imposed by Section 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974. It had its origin in an amendment adopted by the Senate and, as it passed the Senate, the amendment would have added Section 730 to the Code as follows (H. R. 10413, 76th Cong., 3d Sess.):

> SEC. 730. INCOME FROM MINING OPERATIONS.
>
> Income derived from the mining reduction or beneficiation of tungsten, quicksilver, manganese, platinum, antimony, chromite, and tin, or the ores and material containing such metals, shall not be subject to the excess-profits tax provided for in this Act.

While the explanation given in support of the amendment by Senator Pittman (86 Cong. Record, Part. 11, pp. 12347-12348) did not indicate the precise scope of the section, it should be noted that the amendment related to "income derived" from the enumerated functions; thus, although such does not seem to have been the express object of the sponsor of the amendment, it might have been possible for taxpayers to urge that it was intended to extend the exemption to any recipient of such income.

This possibility, however, was removed when the amendment was altered in conference so as to be Section 731 of the Code and to be similar to Section 731 of the Code as it relates to the taxable year here in question; for as finally enacted, the insertion of the requirement that, to claim the exemption, the corporation must be "engaged in the mining" would

seem to have been designed to dispel any notion that a recipient of royalty income could claim the exemption merely because the income had its origin in the mining activities conducted by another taxpayer. Thus, in explaining the changes made by the conferees, Senator Harrison said (86 Cong. Record, Part 12, p. 12919) "we were able to work out a compromise *confining the exemption to the mining* of such metals by domestic corporations * * *." (Italics supplied.) The emphasis, it should be noted, was in relation to an active mining function, not to a passive collection of royalties.

The purpose of Section 731, moreover, is such that there would have been no cogent necessity impelling Congress to extend the tax exemption to corporations which merely receive royalties and which are not themselves currently engaged in mining activities. Section 731, which was repealed in 1941,[2] re-enacted with retroactive effect in 1942,[3] and amended to include additional minerals in 1943,[4] had the obvious purpose of encouraging the production of these critical minerals. See H. Conference Rep. No. 3002 76th Cong., 3d Sess., pp. 55-56 (1940-2 Cum. Bull. 548, 559-560); S. Rep. No. 1631, 77th Cong., 2d Sess., p. 211 (1942-2 Cum. Bull. 504, 658-659); H. Conference Rep. No. 2586, 77th Cong., 2d Sess., p. 64 (1942-2 Cum. Bull. 701, 722); H. Rep. No. 871, 78th Cong., 1st Sess., p. 58 (1944 Cum. Bull. 901, 944);

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[2] Section 205, Revenue Act of 1941, c. 412, 55 Stat. 687.

[3] Section 226, Revenue Act of 1942, c. 619, 56 Stat. 798.

[4] Section 207, Revenue Act of 1943, c. 63, 58 Stat. 21.

S. Rep. No. 627, 78th Cong., 1st Sess., pp. 74-75 (1944 Cum. Bull. 973, 1027). It is significant, moreover, that in none of the hearings, debates or committee reports was it ever suggested that this extraordinary tax exemption should be made available to corporations which merely received royalty income and which did not participate in the risk taking which is involved when another corporation engages in the actual extraction process which constitutes the working of a mine. See Seidman's Legislative History of Excess Profits Tax Laws (1946-1947), pp. 212-216.

This is not to overlook the general impact of the excess profits tax on those corporations possessing an interest in mineral deposits which accelerated production from limited natural deposits in response to the country's war need. Relief from excess profits tax which would otherwise have been imposed on the income from such accelerated production was granted by Section 735 of the 1939 Code (in conjunction with Code Section 711 (a) (1) (I) and (a) (2) (K)) which was calculated to measure the amount of the relief by the extent to which production was accelerated. Section 731, however, with the complete exemption which it afforded to corporations engaged in mining was plainly designed to acomplish an altogether different objective, an objective which, as we have seen, would not encompass taxpayers which were the passive recipients of royalty payments.

The record here clearly shows that Bradley rather than the taxpayer conducted the tungsten mining operations on the Stibnite properties in 1944. It was stipulated that during 1944 and 1945 Bradley oper-

ated the Stibnite properties, built mine buildings, installed the power generating equipment, concentration plant, and other buildings; that Bradley owned the equipment, machinery and other personal property located at the mine; that Bradley operated and worked the Stibnite properties, and extracted, transported, marketed and sold the ore and received the payments from the purchasers; and that at no time before or after the execution of the 1941 contract did taxpayer ever engage in the removal of ore for sale from the Stibnite properties or from the Midnight Group. (R. 25-26.)

Taxpayer argues (Br. 4) that it had engaged in mining activities since its incorporation in 1921 so as to be entitled to the exemption of the statute. The exemption in this case, however, pertains solely to whether the taxpayer was engaged in mining tungsten on the Stibnite properties in 1944. The record references given in support of the taxpayer's argument (Br. 4) all relate to activities in mining other metals on other properties and in other years. The Commissioner has never questioned that taxpayer at all times since its incorporation has been engaged in mining in the Yellow Pine District, or that in 1944 and 1945 it was engaged in mining quicksilver on the Cinnabar property and engaged in mining antimony on Antimony Ridge. It was so stipulated. (R. 24, 26-27.) The *Oregon Chrome Mines* decision, *supra*, does not rest on the fact that the taxpayer there was not engaged in other mining activities.

As to the Stibnite mines, Bradley had worked and operated them for the purposes of mining metals

other than tungsten from 1927 to 1941, under option agreements from the taxpayer. (R. 29-30, 33.) In 1941, tungsten was discovered on the Hennessey tract of the Stibnite mines as the result of drilling operations of the Bureau of Mines, done at Government expense. (R. 73-74.) On December 31, 1941, the taxpayer deeded the Stibnite mines to Bradley and thereafter taxpayer ceased to own any legal interest in the mines except the right to royalties pursuant to the terms of the contract. (R. 31-32.) Even in the years prior to 1941, taxpayer had done nothing with respect to the actual mining of ore, either tungsten or other metals, from the Stibnite area.

Taxpayer contends that it was instrumental in the development of the Stibnite property and made large capital investments. (Br. 4.) Bradley as well as the taxpayer signed the minerals exploration contract with the Bureau of Mines. (Ex. 9, R. 74.) The record indicates that the discovery of tungsten was largely fortuitous. However, who developed the mining operations prior to the taxable year is not believed to be material here. The record shows that whatever taxpayer spent on the property was long prior to the taxable year, whereas Bradley had put at least $100,000 a year into development of the property from 1927 to 1933, although the option agreements had obligated it to spend not over $25,000 a year. (R. 32-33, 73-76, 118.) The record shows that the sale of the Stibnite property to Bradley in 1941 was made because Bradley had the capital to put into the enterprise, whereas the taxpayer did not. (R. 117.)

Taxpayer suggests that it was instrumental in clearing highways so that electric power could be obtained in the Stibnite area. (Br. 4.) The record shows that taxpayer's activities in this respect were as beneficial to its Cinnabar, Smokey Ridge, and Midnight properties as to the Stibnite properties owned by Bradley. (R. 88-90.) The December 31, 1941, contract between taxpayer and Bradley provided (R. 32):

> It is agreed that the time, amount, extent and manner of conducting mining operations and development work upon or in the above-described mining claims shall be in the sole discretion of Bradley * * * and that the failure of Bradley to mine shall not be held to be a condition subsequent defeating the conveyance made hereby.

After that date, the taxpayer had only a royalty interest in the Stibnite property and was merely a passive collector of royalty payments derived from income resulting from Bradley's tungsten mining activities.

Even assuming, *arguendo* only, that treatment processes are included in the term "engaged in the mining" as well as extraction of the ore, the record here does not show that taxpayer was engaged in mining tungsten in 1944. The testimony with respect to taxpayer voluntarily bearing a portion of the cost Bradley incurred for treatment facilities (R. 92-95, 129) is vague and inconclusive. Certainly, there was no obligation on the taxpayer under the terms of the 1941 contract to pay any part of this cost.

Taxpayer is not aided by the administrative ruling

(I.T. 3482, 1941-1 Cum. Bull. 288) on which it relies (Br. 8, 10-12, 18, 22-24). The ruling is an informal one which does "not commit the Department to any interpretation of the law." *Helvering* v. *N.Y. Trust Co.*, 292 U.S. 455, 468. Moreover, the ruling is relied upon only in support of a contention that taxpayer was engaged in the mining of tungsten in 1944 on the theory that it is to be treated as a lessor with an economic interest which entitled it to a depletion deduction on the royalties it received from Bradley. The right to depletion depends upon the receipt of "gross income from the property" (See Section 114 (b)(4) of the 1939 Code, 26 U.S.C. 1952 ed., Sec. 114), which includes royalty income received by a lessor (See *Burnet* v. *Harmel*, 287 U.S. 103), and, as the Court stated in the *Oregon Chrome Mines* case (p. 284):

> That the royalty income falls within that portion of the statute dealing with income attributable to mining there is no dispute.

However, under Section 731 exemption is not for income *attributable to* mining; as related to taxpayer, exemption is accorded only to a corporation "engaged in the mining of * * * tungsten." That this language does not include a corporation whose only relation to the mining of tungsten is in the receipt of royalties as a lessor is supported, as the Court stated in the *Oregon Chrome Mines* case (p. 785), by the fact that it was not until 1950 (long after the taxable year here involved) that Congress saw fit to include a separate provision in order to bring a lessor corporation within the statute. Moreover, in the *Oregon*

Chrome Mines case the taxpayer definitely was a lessor, whereas here taxpayer merely assumes that it may be treated as a lessor on the basis of its assertion that it was entitled to depletion on the royalties involved. In any event, one who in the circumstances of this case owns a depletable economic interest consisting only of a net profits interest (see, e.g., *Burton-Sutton Oil Co. v. Commissioner*, 328 U.S. 25) is certainly not "engaged in the mining of" ore, as required for exemption under Section 731.

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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